IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 224

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, CAPITAL TRANSIT COMPANY, and WASHINGTON TRANSIT RADIO, INC., *Petitioners*,

v.

FRANKLIN S. POLLAK and GUY MARTIN, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF RESPONDENTS IN NO. 224.

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BRIEF OF RESPONDENTS IN NO. 224.

As explained in our brief in No. 295, filed on February 11, 1952, this case and No. 295, in which the parties are reversed, involve different portions of the same radio programs distributed by loudspeakers in the vehicles of Capital Transit Company. This No. 224 involves "commercials" and "announcements"; No. 295 involves all other portions.

OPINIONS BELOW.

The opinion and order of the District of Columbia Public Utilities Commission (R. 114) is reported in 81 P.U.R. (N.S.) 122. The opinion of the United States District Court for the District of Columbia (R. 2, 3) dismissing the petition of appeal from the order of the Public Utilities Commission is unreported. The opinion of the United States Court of Appeals for the District of Columbia Circuit reversing the District Court (R. 124) is reported in 89 U.S. App. D.C. —, 191 F. (2d) 450.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 1, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and the District of Columbia Code, 1940, Title 43, § 705. Certiorari was granted in both No. 224 and No. 295 on October 15, 1951 (342 U.S. 848).

QUESTIONS PRESENTED.

In the view of respondents, this case involves one ultimate question:

> "May the Public Utilities Commission of the District of Columbia approve and uphold a requirement of the monopoly transit company that all bus and streetcar passengers must, as a condition of riding, be subjected to the loudspeaker rendition of radio programs of one radio station which the transit company has, for a money consideration, contracted to impose on the riders?"

This ultimate question turns, in our view, on the following primary questions, which we consider to be the questions presented in this case:

1. Does the loudspeaker rendition of radio programs in the buses and streetcars of a monopoly transit company

deprive respondents and other objecting riders of their liberty in violation of the Fifth Amendment to the United States Constitution by depriving them of the free use of their faculties?

2. Does this loudspeaker rendition deprive respondents and other objecting riders of property in violation of the Fifth Amendment to the United States Constitution by depriving them of the use of their time and attention, for the private benefit of others and without compensation?

3. Does this loudspeaker rendition deprive respondents and other objecting riders of their rights under the First Amendment to the United States Constitution by forcing on them speech which they do not wish to hear, by making it difficult or impossible for them to hear speech of others which they do wish to hear, by making it difficult or impossible for them to read printed words which they wish to read, by making it difficult or impossible for them to speak to others as they choose, by generally interfering with their freedom to listen or not to listen, and to read or not to read, and by the exercise of censorship, through previous restraint, over what they must hear?

STATEMENT OF THE CASE.

Respondents in this case are persons who in the pursuance of their profession and otherwise, in going about from place to place in the District of Columbia, find it necessary to use the streetcars and buses of Capital Transit Company as a means of transportation.

Capital Transit Company enjoys a virtual monopoly of the public transit business between points in the District of Columbia. The only competing line is the Washington, Marlboro & Annapolis Motor Lines, Inc., which operates only in a small portion of the District (R. 39, 139). In November 1951, the latest period for which figures are available, the passengers carried by it were in the proportion of 1 to 108.4 to the passengers carried by Capital

Transit Company. With the exception of that line, there is no competing bus or street car company for transportation within the District of Columbia and anyone desiring to move about by such means of public transportation is compelled to use the vehicles of Capital Transit Company. Congress has provided that no competitive line shall be established unless the Public Utilities Commission finds that the competitive line is necessary for the convenience of the public. The Commission has apparently never made such a finding as to transportation within Washington.[1]

In December, 1948, Capital Transit Company entered into a contract with Washington Transit Radio, Inc. for the installation in all its buses and streetcars of radio-broadcast-receiving apparatus by means of which radio programs are received on such apparatus and disseminated throughout the buses and streetcars by means of loudspeakers (R. 144).

Washington Transit Radio, Inc. in turn has a contract with Capital Broadcasting Company, the licensee and operator of radio broadcast station WWDC-FM, covering the making of the broadcasts which are received and disseminated on the buses and streetcars (R. 84).

Time for commercial announcements on these programs is sold by Station WWDC-FM for private profit and bought by advertisers for private profit. The rates charged by Station WWDC-FM increase with the number of vehicles of Capital Transit Company equipped for radio reception (R. 143). There is a guaranteed minimum payment by Washington Transit Radio, Inc. to Capital Transit Company of $6 per equipped vehicle per month, with a provision for additional payments based on the profits of WWDC-FM. These payments are compensation to Capital Transit Company for the receipt and dissemination of the radio programs to the riders of the streetcars and buses. (R. 143, 150).

[1] Further details concerning the monopoly position of Capital Transit Company are set forth in Point I in our discussion of government action.

Six loudspeakers are installed in each vehicle equipped for radio reception. They are placed and adjusted in such a way that these radio programs are uniformly distributed throughout the vehicle (R. 95-96).

By reason of the monopolistic position of Capital Transit, and by reason of the size of the District of Columbia, hundreds of thousands of persons within the District of Columbia are daily compelled to use the street cars and buses of Capital Transit Company. The Company's average week day revenue fares are approximately 1,000,000 (Monthly Report of Capital Transit Company to the Public Utilities Commission for December, 1951). It is well known that many riders using the vehicles of Capital Transit Company to and from work spend a half an hour or more in the vehicles each way.

The number of vehicles equipped for the reception of these radio broadcasts was 212 at the time of the hearing (R. 34, 37, 116). The present figure is larger but is unknown to respondents. It is the plan to install the equipment in all vehicles (R. 37, 146-147).

The sound of these programs cannot be escaped by anyone in the vehicle. This is a fact of common knowledge and is demonstrated by the objections made to these programs. The Commission's Order of Investigation of July 14, 1949 recited, as a ground for the Order, that the Commission had received a number of communications protesting these programs (R. 28). The Commission's opinion sets forth many objections to the programs raised by individuals who attended the hearing (R. 117). Testimony at the hearing by witnesses for Capital Transit Company and Washington Transit Radio, Inc. shows that the sound cannot be escaped (R. 38, 78-82, 95-96). This was shown also by a "Public Opinion Survey" made for Capital Transit Company and Washington Transit Radio, Inc. (R. 155-156). WWDC-FM has advertised that by means of these programs it is capable of "delivering a guaranteed audience" (1949 Radio Annual, 363). The audience of monopoly

transit companies receiving such programs has from the beginning been known in the trade as a captive audience (Electronics, June 1948, p. 72; Sales Management, Jan. 15, 1949, p. 94; Communications, August 1949, p. 12). A recent manual entitled "Successful Radio and Television Advertising," by E. F. Seehafer, Assistant Professor of Advertising at the University of Minnesota, and J. W. Laemmar of the J. Walter Thompson Company (McGraw-Hill Book Co., Inc., 1951), contains the following at page 46:

> "Transit FM offers a guaranteed audience, for commuting is consistent and transportation figures are readily available. The transit audience is a captured audience, unable to dial other radio stations and unable to turn off the set. Potential 100 per cent effectiveness, however, may be decreased somewhat by conversation, traffic noises, and reading.
>
> * * * * *
>
> "Both this section on transit radio and the preceding section on storecasting have presented the positive side of the picture, but it must be kept in mind that neither transit radio nor storecasting enjoy universal approval. There are certain prejudices against advertising in this manner which have yet to be overcome."

Petitioners quote in their brief (Pet. Br. 5) the following statement by one of the witnesses who testified before the Commission in opposition to the broadcasts:

> "I think I agree with the psychiatrist and the engineer here who said, 'you can shut off your mind to what you don't want to hear,' and therefore, I think most people shut off their minds to commercials."

The psychiatrist referred to in this statement (which is part of the certified minutes of the Public Utilities Commission physically present in this Court but not part of the record certified by the District Court to the Court of Appeals) was Dr. Winfred Overholser, Superintendent of St. Elizabeth's Hospital and former president of the

American Psychiatric Association, who was called as a witness at the hearing by respondents. His testimony was directly to the contrary of that attributed to him in the statement just quoted. He testified, among other things, to the following effect: noise is pretty much whatever sound a person finds unpleasant (Transcript of the P. U. C. Hearing, 429). Individuals vary greatly in sensitivity to noise, including music, and many take violent objection to certain types of music (Tr. 421). Individuals vary substantially in their ability to shut off attention to a noise they dislike (Tr. 422) and those who are oblivious to what is going on are a minority (Tr. 422). An objectionable noise may interfere with a particular person's reading, conversation (regardless of the volume of noise) and thinking (Tr. 422-423). Whether exposure to a noise is by choice or by compulsion is "always a factor" in determining its effect (Tr. 425).

Petitioners state (Pet. Br. 5) that the Commission found "that the hearing of Transit radio programs 'is a matter of the working of the mind' and that 'a person can differentiate between sounds or can get used to a sound and put it out of his mind.'" Examination of the Commission's Order (R. 114-120), however, indicates that it made no finding on this point, or any other.

The programs consist of commercials, "public service announcements," news reports, sports reports, weather and time reports, station identification, and music. (R. 38, 140-142). The programs are continuous, with the music occupying all the intervals between textual material (R. 142). At the time of the hearing, these programs were received from 7 A.M. to 7 P.M., Mondays through Saturdays, but not at all on Sundays (R. 38).

Objections of a wide variety have been made to these programs by riders in Capital Transit's vehicles. The above-mentioned "Public Opinion Survey" lists the following objections, among others: too much noise, confusion; want to think, read, study, relax, sleep, talk; annoying, nerve-rack-

ing, irritating; like quiet; don't like programs; resent being forced to listen; intrudes on privacy (R. 155-156). Similar objections were raised by individuals at the hearing (R. 117). Over thirty individuals in all voiced objections to the programs at the hearing.[2]

Respondents are among those who object to being required to listen to the programs in question. They assert that the programs make it difficult for them to read and converse and deprive them of their privacy (R. 5).

On July 14, 1949, the Public Utilities Commission of the District of Columbia published an order "that an investigation be made to determine whether or not the installation and use of radio receivers on the streetcars and buses of Capital Transit Company is consistent with public convenience, comfort and safety; . . ." (R. 28). The Commission ordered a formal public hearing upon this subject. Thereafter, on September 19, 1949, a notice of hearing was issued (R. 29). The public hearing was held over a 4-day period commencing October 27, 1949.

Respondents, as individuals and regular passengers upon the streetcars and buses of Capital Transit Company, were permitted to intervene in the proceeding before the Public Utilities Commission, under a rule of the Commission providing for intervention, with the Commission's permission, by a person who files formal application showing a "substantial interest" in the subject of the proceeding. (Rules 7.1 and 7.3 of the Commission Rules of Practice and Procedure). Respondents' applications for leave to intervene were not answered by Capital Transit Company, which was then the only other party to the investigation.

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[2] The statement made several times by Petitioners (Pet. Br. 5, 36, 43) that only two users of Capital Transit's service "testified" as to their objections to the radio programs involves the use of the word "testify" in the sense of giving testimony under oath. The Commission, however, both at the hearing and in its Opinion, used the words "testified," "testimony" and "witness" as referring to statements of view made at the hearing by persons not under oath. This point is discussed in further detail in Point V below.

Respondents participated fully in the Commission's hearing and filed a 29-page brief with the Commission, containing lengthy and detailed proposed findings of fact and conclusions of law.

On December 19, 1949, the Public Utilities Commission entered an order stating its conclusion that the operation of the loudspeakers in the streetcars and buses was not inconsistent with public convenience, comfort and safety and ordered that the investigation be dismissed (R. 114-120). An appropriate application for reconsideration, including a supporting brief, was filed by respondents and was denied on February 15, 1950 (R. 121-122).

Thereafter respondents, in accordance with the appropriate statutory authority (D. C. Code (1940) Sec. 43-705), filed an appeal in the United States District Court for the District of Columbia (R. 4). In that proceeding Capital Transit Company and Washington Transit Radio, Inc. were permitted to intervene (R. 19); each of them and the Public Utilities Commission filed a motion to dismiss, principally upon the ground that respondents had not stated a claim upon which relief could be granted (R. 16-18).

The motions to dismiss came on for oral argument before a judge of the District Court who, after argument, granted the three motions to dismiss (R. 20-21). In an opinion from the bench the court said that the dismissal was on the ground that "basically there is no legal right of the petitioners [respondents here] . . . which has been invaded, threatened or violated by the action of the Public Utilities Commission . . ." (R. 3).

Respondents appealed to the United States Court of Appeals for the District of Columbia Circuit. That court reversed the action of the District Court and returned the case to the District Court with instructions to vacate the Commission's order and remand the case to the Commission for further proceedings in conformity with its opinion (R. 124-131). The Court of Appeals held that government action was involved (R. 127); that "Transit passengers

commonly have to hear the broadcasts whether they want to or not", (R. 126); that "One who is subjected to forced listening is not free in the enjoyment of all his faculties" (R. 128); and that the programs "deprive objecting passengers of liberty without due process of law" (R. 130). The court, however, limited its holding to "commercials" and "announcements".[3]

This Court granted certiorari on October 15, 1951, 342 U. S. 848. Respondents contend here, as they contended in the court below, that the forced listening which is imposed on them invades rights guaranteed them by the First and Fifth Amendments to the Constitution and that government action is involved within the meaning of the cases applying these Amendments.

SUMMARY OF THE ARGUMENT.

Point I. The action here complained of is government action. A government-granted and government-protected monopoly is being exploited for a purpose foreign to its legitimate intent and in violation of rights of persons who by practical compulsion must patronize the monopoly. Further, the Government has sanctioned and approved the practices by the decision of the Public Utilities Commission in this matter.

Point II. Forced listening deprives objecting passengers of liberty and property without due process of law in violation of the Fifth Amendment. By depriving them of the freedom to use their faculties as they choose, it deprives them of liberty. By taking their attention and the full use of their time, it takes property. There are no countervailing rights which may be weighed against the rights of objecting passengers.

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[3] Respondents filed a conditional cross-petition for certiorari directed against this limitation on the court's holding, which was granted. See brief in No. 295, filed February 11, 1952.

Point III. The rights of objecting passengers under the free speech guaranty of the First Amendment are abridged by forced listening. The interest protected by the First Amendment is freedom of communication. Forced listening violates the First Amendment rights of objecting listeners to read, converse and think and their right not to listen. Putting the force of Government behind the communication of particular ideas to a captive audience violates the rule against previous restraints on free speech. There is no First Amendment right to utter the programs involved or of non-objecting passengers to hear them.

Point IV. The Public Utilities Commission had authority to consider claims of constitutional right and its dismissal of its investigation was unlawful. The Court of Appeals had power to review and set aside this erroneous action.

Point V. The decision of the Court of Appeals was based on facts and considerations properly before it. The court did not commit prejudicial error in mentioning matters outside of the record.

ARGUMENT.

Point A. The action here complained of is government action.

A. THE TOTALITY OF GOVERNMENT ACTION IN THIS CASE.

Respondents contend that the practices complained of in this case violate their constitutional rights. Concededly, the guarantees of the Bill of Rights do not protect against actions of a purely private character. But no such action is involved here. Forced listening is being imposed upon respondents by government action.

"Government action", like many another in the field of constitutional law, is a concept with a practical orientation. What is government action for one purpose may not be government action for another purpose. The Court does not decide the question in a vacuum, but only in relation to

the particular problem in hand.[4] But the Court properly applies a broader standard where the question is one of invasion of important rights by actions which have an admixture of government power in the compulsion exercised. *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). Nor should the Court give weight to the argument that its decision in this case (wrongly interpreted and extended by a mechanical logic repugnant to common-law principles) might later produce some untoward result. " . . . [H]ypothetical situations can be conjured up, shading imperceptibly from the circumstances of this case and by gradations producing practical differences despite seemingly logical extensions. But the Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.' . . . " *Rochin* v. *California*, 342 U. S. —, — (January 2, 1952).

This case is one of those in which action, having in some formal aspects a "private" character, is nevertheless subject to constitutional restraint because the Government has lent its power to the "private" party and he has used the power to abuse important rights—rights which the Government itself could not have invaded. Cases of this sort fall generally into two classes. In one class, private action comes first and then the Government is asked to enforce or aid it, as in *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). In the other class, the government action comes first in the form of a grant of some kind of governmental power to an individual, corporation or group, which then proceeds to abuse it. This class is illustrated by *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944) and the election cases, discussed below. The case now before the Court has the characteristics of both of these classes. In the beginning the Government granted a monopoly to the transit company to engage in mass transportation of people within Washington and over the public streets of the city. This monopoly created a compulsion upon respondents and other

[4] Compare *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945).

denizens of Washington to use the vehicles of the transit company for the purposes of transportation. Taking advantage of this compulsion, the transit company contracted with Transit Radio to sell the attention of this captive audience. Then the Government re-entered the picture, through the Public Utilities Commission, and effectively sanctioned and approved the practices complained of.

B. THE GOVERNMENT'S CREATION AND PROTECTION OF CAPITAL TRANSIT'S MONOPOLY.

Capital Transit Company was created by a merger of formerly independent transit lines in the District of Columbia. A statute popularly known as the Antimerger Law had previously prohibited merging. Act of March 4, 1913, Section 11, 37 Stat. 1006. The merger occurred as a specific exception to this prohibition. Congress first authorized the competing transit lines to merge, with a provision that the merger should not be effective until subsequent Congressional approval. Act of March 4, 1925, 43 Stat. 1265. A Unification Agreement was then entered into between the competing lines, providing for the formation of Capital Transit to take over their business. This agreement specifically stated:

> "Fifteenth. Legislation obtained to effectuate this agreement shall contain a provision that no competitive street-railway or bus line, that is bus or railway line for the transportation of passengers of the character which runs over a given route on a fixed schedule, shall be established without the prior issuance of a certificate by the Public Utilities Commission of the District of Columbia to the effect that the competitive line is necessary for the convenience of the public."

The legislation by which Congress subsequently approved the merger set forth the Unification Agreement in full in its body and, in fulfillment of the provision just quoted, stated:

"Sec. 4. No competitive street railway or bus line, that is, bus or railway line for the transportation of passengers of the character which runs over a given route on a fixed schedule, shall be established without the prior issuance of a certificate by the Public Utilities Commission of the District of Columbia to the effect that the competitive line is necessary for the convenience of the public." January 14, 1933, 47 Stat. 760, ch. 10, § 4; D. C. Code (1940) §§ 44-201.

While the statute on its face permits the Public Utilities Commission to authorize competing transit service which it finds to be "necessary for the convenience of the public," such a showing apparently has never been made in the almost twenty years since its enactment. Capital Transit has in fact had an almost complete monopoly of mass transportation in the District of Columbia since its creation,[5] and it has been vigilant to call upon the regulatory agencies

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[5] One other company (Washington, Marlboro & Annapolis Motor Lines, Inc.) is authorized to pick up and deposit passengers within the District of Columbia (R. 39). Monthly reports for November, 1951 (the latest reports available), filed with the Public Utilities Commission of the District of Columbia by W. M. & A. and Capital Transit, respectively, show that in that month W. M. & A. in all its operations, both in Maryland and in the District, carried a total of 253,029 passengers as against 27,419,503 carried by Capital Transit—a ratio of 1 to 108.4. W. M. & A.'s passenger revenue for the month was $44,466.72 as compared to a revenue of $2,334,479.59 for Capital Transit. W. M. & A. operates in only one area of the District of Columbia; its buses run from a terminal at 403 11th St., N. W., to Seat Pleasant, Forestville, Temple Hills, Oaklawn, Camp Springs and North Beach, all in Maryland. There are two local lines, the Bradbury Heights Local and the Suitland Local, which operate entirely within the District of Columbia. See *Re Washington, Marlboro & Annapolis Motor Lines, Inc.*, Opinion and Order No. 3088, Formal Case No. 349 (D.C. P.U.C., Sept. 19, 1946); see also R. 139. The lack of importance which Capital Transit ordinarily attaches to the W. M. & A. operations is shown by the fact that E. C. Giddings, Vice President of Capital Transit, who appeared as a witness in the Public Utilities Commission hearing in this matter, mentioned W. M. & A. only as an afterthought (R. 39).

and the courts to aid it in protecting this monopoly.[6] There is no reason to assume that its monopoly will not continue indefinitely.[7]

C. THE GOVERNMENTAL COMPULSION TO RIDE AND TO LISTEN.

The opposite side of this monopoly coin is compulsion to ride. The great mass of the people in the District of Columbia must utilize the vehicles of Capital Transit in going to and from their daily work and on other travels within the District, necessary or otherwise.[8] Economic considerations aside, traffic and parking conditions make it impossible for more than a fraction of those working or otherwise visiting the down town section to utilize private automobiles, and taxicabs, as common as they are in Washington, can carry only a small fraction of the number of per-

[6] See *Capital Transit Co.* v. *United States*, 97 F. Supp. 614 (D.C. 1951); *Capital Transit Co.* v. *Safeway Trails, Inc.*, C. A. No. 467-52 (U. S. Dist. Ct., D. C., 1952); *In the Matter of Anchorage Transportation Inc.*, P. U. C. Order No. 3368, Formal Case No. 376 (D. C. P. U. C., April 26, 1948).

[7] Petitioners suggest that Capital Transit's monopoly may disappear "tomorrow" if the Public Utilities Commission finds it in the public interest to authorize operation of a competing line (Pet. Br. 24). This suggestion has little force in the light of the fact that Capital Transit has had a monopoly for twenty years, which it has made diligent efforts to preserve. The Court must consider the realities of the situation. Cf. *United States* v. *Classic*, 313 U. S. 299, 318-319 (1941), where the Court in holding that the right to vote at a primary election is included in the right protected by Art. 1, § 2 of the Constitution emphasized that in Louisiana the right to choose a representative is in fact controlled by the primary. Capital Transit's monopoly may some day disappear, just as the monopoly aspects of Louisiana primary elections may some day change, but while the monopoly endures the Court should recognize it as such.

[8] Cf. *United States* v. *Capital Transit Co.*, 325 U. S. 357, 359 (1945) in which the Court noted that government employees employed in the Pentagon and nearby establishments "were compelled to begin or complete their trips by utilizing buses or streetcars of Capital Transit."

sons who require transportation.[9] The compulsion to ride is a compulsion to hear, because one cannot ride a radio-equipped bus or streetcar and not hear. There is a direct causal relationship between the acts of the Government and the denial of the civil rights of objecting passengers; a directly stateable nexus between the government action which indisputably took place and the coercion of listening. The rider has to listen to the broadcast, because he has to ride the bus. He has to ride the bus, because it is the only bus. It is the only bus, because Congress in effect has enacted that it shall be the only bus. The rider's absence of alternative is merely another way of speaking of the company's monopoly, which is the creation of Congress.[10]

Petitioners attempt to minimize this aspect of the case in their brief (Pet. Br. 23-24). The monopoly issue, however, goes to the very heart of the matter. Respondents' argument is simply this: Government action is present for the purpose of applying the constitutional guarantees where a government-granted and government-protected monopoly

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[9] As to the expense of using a privately owned automobile: Capital Transit has over a long period carried car cards showing a saving of over $200 a year through using its vehicles instead of a privately owned automobile. These cards show five cents a mile as the cost of operating an automobile and show, as the daily cost of parking, a much lower figure than is charged by some lots. As to the seriousness of the parking problem in downtown Washington: see generally the report to the Board of Commissioners of the District of Columbia by the Commissioners' Special Advisory Committee on Parking, dated February 8, 1952; the series of articles under the title "Progress or Decay?" in the Washington Post, beginning January 27, 1952; and a report of speeches by officials of Washington and New York City at the Washington Board of Trade, Washington Post, December 19, 1951, page 1. Many Capital Transit buses now carry on their rear ends a placard saying: "Nobody Aboard is Worried About Parking".

[10] It should be noted that Capital Transit refrains from imposing the broadcasts on its riders in a situation where there *is* competition; its contract with Washington Transit Radio, Inc., expressly reserves the right in Capital Transit to turn transit radio equipment on or off, in Capital Transit's discretion, insofar as "vehicles operating under charter" are concerned. Art. III(7), R. 148.

in an important area of modern urban life is exploited for a purpose foreign to its legitimate intent and in violation of rights of persons who by practical compulsion must patronize the monopoly.[11]

D. GOVERNMENT ACTION THROUGH ABUSE OF THE MONOPOLY POWER.

1. The Railway Labor Act cases.

As a case involving the abuse of a governmentally-granted monopoly power, the present case is closely analogous to *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944). The *Steele* case involved racial discrimination by a union against certain of the railroad employees whom, under the Railway Labor Act, the union had the exclusive right to represent for collective bargaining purposes. The union had for this purpose been given a monopoly by the Government, and it had abused it, in violation of rights of the Negro employees. The Court had in mind the force of the constitutional arguments raised. Chief Justice Stone, in his opinion for the Court, remarked that, if the Railway Labor Act were construed to permit this sort of discrimination, "constitutional questions [would] arise" (323 U. S. 198). The Court, however, found it unnecessary to decide the constitutional question; instead, it construed the Railway Labor Act as prohibiting discrimination, holding that the Act could not be construed to give the union the power to act in disregard of the rights of those it represented.

The implications of the *Steele* case are clearly recognized in *Betts* v. *Easley*, 161 Kan. 459, 169 P. (2d) 831 (1946). That case similarly involved discriminatory action by a labor union under the Railway Labor Act. The court held

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[11] For this reason such cases as *McIntire* v. *William Penn Broadcasting Co. of Philadelphia*, 151 F. (2d) 597 (C. C. A. 3d, 1945), cert. den. 327 U. S. 779 (1946) and *Picking* v. *Pennsylvania R. Co.*, 151 F. (2d) 240 (C. C. A. 3d, 1945), cited by petitioners (Pet. Br. 21-22), have no relevancy to the issues before the Court.

squarely that the discriminatory practices were in violation of the Fifth Amendment, and said that

> "The view that the acts complained of are solely those of a 'private association of individuals' is wholly untenable. The acts complained of are those of an organization acting as an agency created and functioning under provisions of federal law."

The same thought was emphasized in this Court's decision in *American Communications Association* v. *Douds*, 339 U. S. 382, 401 (1950) where the Court said, with reference to collective bargaining representatives designated under statute, that

> "when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself."

Just as the minority employee in the *Steele* and *Betts* cases had no choice of a bargaining representative—being bound by the acts of the agent selected by the majority of the employees and vested by statute with monopoly power—so in the instant case the passenger has no choice of a method of conveyance; and the presence of government action is much more obvious because the Government has not merely set up the monopoly condition but actively supervises the functioning of the monopoly and has passed on and sanctioned the practices complained of. The Government's thumb on the scales is heavier here than in the field of collective bargaining.

2. The election cases.

Violation of constitutional rights through abuse of monopoly power in another field is shown by the decisions holding that private persons functioning as political parties are subject to the prohibitions of the Constitution under certain circumstances. *Smith* v. *Allwright*, 321 U. S. 649

(1943); *Nixon* v. *Condon*, 286 U. S. 73 (1932); *Rice* v. *Elmore*, 165 F. (2d) 387 (C. C. A. 4th, 1947), cert. den. 333 U. S. 875 (1948). Even though a political party for some purposes may be a mere association of private individuals, when it acts in a matter of high public interest with the aid or even acquiescence of the State its action is State action for the purpose of determining the applicability of constitutional limitations. As Mr. Justice Cardozo said in *Nixon* v. *Condon*, *supra*,

> "The test is not whether the members of the Executive Committee [of the Texas Democratic Party] are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action." (286 U. S. 89).

3. The special position of Capital Transit and transportation companies generally.

The functions of a labor union are certainly not governmental in character. The functions of a political party are important to the Government, but they are not the type of function which the Government itself must carry on, see *United States* v. *Classic*, 313 U. S. 299 (1941). Mass transportation, however, whether carried on by private persons or by Government itself, is a matter peculiarly of governmental concern.[12] This has long been recognized. In 1873 this Court said that the function performed by a railroad was "that of the state" (*Olcott* v. *County Board of Supervisors*, 16 Wall. (83 U. S.) 678, 695; see also Mr. Justice Harlan's dissent in the *Civil Rights Cases*, 109 U. S. 3, 37-39 (1883); *Marsh* v. *Alabama*, 326 U. S. 501, 506 (1946) and cases cited in n. 3 of the opinion). How much more this is true of modern-day urban mass transportation is shown by the fact that in such important metropolitan cen-

[12] See MacIver, The Modern State 190 (1926).

ters as New York, Chicago, Boston, Detroit, Cleveland, San Francisco and Seattle the municipal government has taken over the operation of local transit systems.[13] Capital Transit itself is far too closely involved in the functioning of community life in Washington to be able to assert that its actions are merely those of a private person. The legislative history of the merger which gave birth to Capital Transit shows clearly a public concern in seeing that merger take place.[14] The final terms of the merger resolution were agreed upon by representatives of the utilities and other interested parties in the Senate District of Columbia Committee room.[15] The terms of the joint resolution relieved the transit company from the duty of paving streets and paying for traffic policemen at crossings.[16] The company uses streets that are a public easement as a matter of law and that are in fact kept up by public funds. Later, Capital Transit was consulted on the location of the Pentagon Building,[17] and its fares thereto were a factor in wartime morale among Government employees.[18] Capital Transit is a private corporation for most purposes, but when it in-

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[13] Taff, Commercial Motor Transportation 395-6 (1950); What Are the Facts About Municipally-Owned Transit?, 46 Bus Transportation, No. 1, p. 2 (January 1950). This has not been done because of any hope of financial advantage to the municipality; on the contrary, deficits are common in municipal operation. *Ibid.*; see also Bauer and Costello, Transit Modernization and Street Traffic Control 232 (1950).

[14] See H. Rept. 1030, S. Rept. 691, 72d Cong., 1st Sess.; 76 Cong. Rec. 678-680, 683-686, 687-691, 737-742, 743-744, 820-822, 908-915 (1932).

[15] 76 Cong. Rec. 744, 820, 908 (1932).

[16] Jan. 14, 1933, 47 Stat. 752, 759, ch. 10, § 3 (1933).

The District of Columbia Commissioners were directed to give one of Capital Transit's predecessors an easement or right of way in connection with the straightening and shortening of Michigan Avenue. Act of March 4, 1929, 45 Stat. 154, ch. 682, § 7, D. C. Code (1940) §§ 7-131.

[17] Exhibit 56, Record in *United States* v. *Capital Transit Co.*, 325 U. S. 357 (1945), pp. 998-999 (Letter from E. D. Merrill, President of Capital Transit Company, to Gen. B. B. Somervell).

[18] *United States* v. *Capital Transit Co.*, 325 U. S. 357 (1945).

vades the rights of a captive audience which the Government has had a hand in assembling for it, it cannot be heard to say that it is only doing what any private person could do.

The fact that transportation companies and other utilities are regulated does not in itself make their acts government action. It does, however, negate any claim that a street-railway company is a private person like any other. Utilities are subject to a duty to serve the public—a duty not resting so much on any governmental grant of power as on the nature of the functions they perform.[19] Their peculiar character is illustrated by the recent cases involving discrimination by private action of interstate common carriers, and holding carrier regulations void as a burden on interstate commerce. (*Chance* v. *Lambeth*, 186 F. (2d) 879 (C. A. 4th, 1951), cert. den. 341 U. S. 941 (1951); *Whiteside* v. *Southern Bus Lines, Inc.*, 177 F. (2d) 949 (C. A. 6th, 1949); *Solomon* v. *Pennsylvania R. Co.*, 96 F. Supp. 709 (S. D. N. Y. 1951)). It has always been assumed in the decisions of this Court that the doctrine of unconstitutional burden on interstate commerce is directed only against state action of some sort (*Morgan* v. *Virginia*, 328 U. S. 373, 377 (1946); *Marsh* v. *Alabama*, 326 U. S. 501, 506 (1946); *Chiles* v. *Chesapeake & Ohio R. Co.*, 218 U. S. 71 (1910)). The *Chance*, *Whiteside* and *Solomon* cases go beyond the holding of the *Morgan* case, finding that purely private action can amount to an unconstitutional burden on interstate commerce. At the least, these cases strikingly illustrate the public character of common carriers and the trend toward broadening of the concept of government action. When there is added to this inherent public character a government-granted and government-protected monopoly, a compulsion to ride the vehicles of the transit company, an abuse of this monopoly by exploiting the captive audience thus created, an upholding of the practice by the regulatory

[19] See Wyman, The Law of the Public Callings as a Solution of the Trust Problem, 17 Harv. L. Rev. 156, 217 (1904).

agency of the Government, we have a proper case for applying "the great restraints of the Constitution".

The holding of the court below on the government-action point is anticipated in several decisions of lower courts. In *Nash* v. *Air Terminal Services*, 85 F. Supp. 545 (E. D. Va. 1949) the court held that a private restaurant operated in the Washington National Airport building under a concession from the federal government violated the Constitution in denying equal facilities to a Negro airline passenger, saying that ". . . its restaurants are too close, in origin and purpose, to the functions of the public government to allow them the right to refuse service without good cause . . ." In *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S. D. W. Va. 1948) the court held that a city could not relieve itself of the obligation not to discriminate against Negroes in the operation of a swimming pool, by leasing the pool to a private organization for a nominal consideration. The court said: "It is not conceivable that a city can provide the ways and means for a private individual or corporation to discriminate against its own citizens." (76 F. Supp. 1009). In *New Prytania Market Association* v. *Beoubay*, 185 So. 531 (La. App. 1939), it was held that a private corporation operating a market under lease from a city could not arbitrarily refuse to renew a stall lease; the city itself could not have acted in that fashion under the Fourteenth Amendment. A monopoly was involved, since by ordinance no private market could be located within a certain distance from the market in question. Operating a market may be a historical governmental function, but running a restaurant or maintaining a swimming pool is remote from the traditional concept of government function—far more remote than such a vital matter as mass transportation.

E. GOVERNMENT ACTION THROUGH APPROVAL BY THE PUBLIC UTILITIES COMMISSION.

It is clear, therefore, under the authorities thus far discussed, that the abuse of the governmentally-granted mo-

nopoly of power constitutes of itself, in the circumstances of this case, government action making applicable the guarantees of the Bill of Rights. That abuse of monopoly power, as we have said, is the heart of this case.

But the government action in this case does not stop at that. The Government has done more. It has approved this abuse of power. It has done so through its agency specifically charged with the regulation of this monopoly.

In giving its approval through the Public Utilities Commission it has done so in accordance with the procedure established for the control of this monopoly and by application of the standard prescribed by Congress for holding this monopoly within bounds:

(a) As to procedure, a definite principle is consistently set forth throughout the Act under which the Commission exercises its power. That principle is that the Commission is to regulate after the event. A public utility may in general act as to matters of service without prior Commission approval. After the event the Commission may act to review what has occurred, either on its own motion or on complaint, and the Commission may then, after hearing, order discontinuances or changes. Only in one or two instances is the utility required to obtain Commission approval before action. The procedure followed by the Commission in this case is a typical regulatory procedure.

(b) As to service (as distinguished, for example, from rates), the standard prescribed is that it shall be "safe and adequate . . . just and reasonable" (D. C. Code, 1940, Secs. 43-301, 43-414) and promote the "comfort" and "convenience of the public" (Sec. 43-208); that it shall not be "unjust, unreasonable, insufficient" (Sec. 43-411) or "uncomfortable, inconvenient" (Sec. 43-208). The Commission in its opinion (R. 116) obviously construed these provisions as amounting together to the standard which it prescribed in this case—"public convenience, comfort and safety".

What the Commission did,—notwithstanding the statutory declaration that the term "service" is used in the Act "in its broadest and most conclusive sense" (Sec. 43-104)—was to hold that the forcing of these programs on unwilling riders subjected to them by governmental action was consistent with the basic statutory requirement of "public convenience, comfort and safety".

In so doing it put the seal of governmental approval on the use being made of the monopoly of governmental power previously granted.

If the Public Utilities Commission had decided that the broadcasts were contrary to public convenience, comfort and safety or in violation of the constitutional rights of passengers, as it should have done, then the broadcasts would have stopped. Since it decided otherwise, they have gone on. The responsible choice was the Commission's, and it cannot escape the responsibility for that choice by saying that it made none.[20] To suggest that a "negative" order cannot be the final step in a misuse of government power is to assert a distinction that this Court has repudiated. " . . . An order of the Commission dismissing a complaint on the merits and maintaining the status quo is an exercise of administrative function, no more and no less, than an order directing some change in status." *Rochester Telephone Co.* v. *United States*, 307 U. S. 125, 142 (1939). See also *Mitchell* v. *United States*, 313 U. S. 80, 92 (1941); *Henderson* v. *United States*, 339 U. S. 816 (1950). Even failure to enter any order may be a denial of constitutional rights. *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587 (1926). As the court below held,

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[20] This aspect of the case is discussed from a different angle under Point IV, *infra*.

In so far as petitioners use the decision of the Commission as a shield against interference with their carrying on of the transit radio scheme, they make it all the clearer that state action is involved, since their action is "sanctioned . . . by the state" and "protected . . . by some 'shield of state law or state authority' " (*Civil Rights Cases*, 109 U. S. 3, 17 (1883). *Cf. Shelley* v. *Kraemer*, 334 U. S. 1 (1948)).

> "By dismissing its investigation the Commission declined to prevent valid action of Congress from having an unintended and unnecessary result." (R. 127-8).

Since the Commission has given its approval to the arrangements for the reception of these programs, the case is, in this aspect, of a type resembling those in which government action for constitutional purposes is found to lie in a sought-for exertion of governmental power in aid of a private scheme, even in the absence of any prior governmental action. *Shelley* v. *Kraemer*, 334 U. S. 1 (1948).[21]

Also illustrative of the class of cases where private action is followed and enforced by governmental action is *Marsh* v. *Alabama*, 326 U. S. 501 (1946). There the Court held that the property rights of the owner of a company town did not override the right of free speech so as to permit the institution of a criminal prosecution for trespass against one who had persisted in distributing religious literature on the streets. The Court said:

> "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." (Page 506)
> "In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental rights and the enforcement of such restraint by the application of a state statute." (Page 509)

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[21] If the Public Utilities Commission had ruled against transit radio, as it should have, and Capital Transit had then brought an appeal to the District Court, the decision in *Shelley* v. *Kramer* makes it clear that no judicial relief could have been granted, since the constitutional rights of objecting passengers would have been abridged. To contend that a different result should follow because the Public Utilities Commission erred is to assert a distinction without a difference.

The acts of individuals are outside the ambit of the Constitution only so long as they are "unsupported by state authority in the shape of laws, customs or judicial or executive proceedings." *Civil Rights Cases*, 109 U. S. 3, 17 (1883).

Affirmance of the decision in this case will not have the effect—asserted by petitioners, Pet. Br. 20—of turning Capital Transit into a government agency. Nor will it raise every action of a street railway company or a railroad to the level of a constitutional issue.[22] All that the court below held is that when a corporation exercising a public function under a monopoly grant given it by the state and protected by the state makes direct use of the practically coercive power which its franchise gives it to force patrons to submit to an infringement of rights such as are involved here, and when the regulatory government agency upholds this practice, the courts may stop it.

Point II. Subjecting transit passengers to forced listening deprives them of liberty and property without due process of law, in violation of the Fifth Amendment.

A. LIBERTY

The imposition of forced listening under the circumstances of this case deprives the rider of the liberty of using his faculties, his conscious mind, as he chooses. This is perhaps the most basic of all liberties—the liberty which many other specifically guaranteed liberties subserve. The objecting rider is deprived of this liberty here by an invasion of his mind through his sense of hearing—an invasion which he is powerless to prevent. There is nothing new about the liberty asserted here. It is only the particular form of invasion which is new, because only recently have technology and organization developed sufficiently to in-

[22] Where the Government operates a railroad or street-railway system, every action it takes is, in some sense at least, a governmental action, but not every governmental action is unconstitutional.

vade that liberty, been combined to that end with the power of the Government.[23]

1. Principles stated by this Court.

The term "liberty" as used in the Fifth and Fourteenth Amendments is one of broadest import, which for more than half a century this Court has repeatedy declared to include the liberties of mind invaded in this case.

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589 (1897), this Court defined it as meaning "not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; . . ." That statement was repeated in substantially identical terms in *Grosjean* v. *American Press Company, Inc.*, 297 U. S. 233, 244 (1936). Not long after the *Allgeyer* case the Court said that "Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling." (*Smith*

[23] Baron Bramwell's remarks in his charge to the jury in *Regina* v. *Druitt*, 10 Cox Crim. Cas. 592, 600-601 (Central Criminal Court 1867), although uttered in a different context, are peculiarly appropriate here. He told the jury that "No right of property or capital, about which there had been so much declamation, was so sacred or so carefully guarded by the law of this land as that of personal liberty. . . . But that liberty was not liberty of the body only. It was also a liberty of the mind and will; and the liberty of a man's mind and will, to say how he should bestow himself and his means, his talents, and his industry, was as much a subject of the law's protection as was that of his body. Generally speaking, the way in which people had endeavoured to control the operation of the minds of men was by putting restraints on their bodies, and therefore we had not so many instances in which the liberty of the mind was vindicated as was that of the body. Still, if any set of men agreed among themselves to coerce that liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offence, namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they so conducted themselves."

v. *Texas*, 233 U. S. 630, 636 (1914)). In *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923) the Court said:

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [Citing cases] The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."

Again, in *Palko* v. *Connecticut*, 302 U. S. 319, 327 (1937), the Court said, through Mr. Justice Cardozo:

> "Of that freedom [freedom of thought and speech] one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. . . . So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint . . . "

The "fundamental rights to life, liberty, and the pursuit of happiness" (*Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886)) are nothing if they do not include liberty in the use of the mind.

The words of Mr. Justice Brandeis in his dissenting opinion in *Olmstead* v. *United States*, 277 U. S. 438, 478 (1927), though uttered in a different context, are particularly applicable here:

> "The makers of the Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."[24]

2. Specific applications.

This Court has recognized the existence of the right to be let alone in a number of cases involving specific situations relevant to the present case. In *Martin* v. *Struthers*, 319 U. S. 141 (1943) the Court acknowledged the right of a householder to be free from unwanted intrusion upon the privacy of his home. The decision struck down the anti-canvassing ordinance involved, because it went too far in restricting the freedom of speech of the canvassers as well as the rights of those householders who wished to hear their message. The Court, however, recognized that there was a legitimate right to be protected against annoyance. As Mr. Justice Burton later said in his opinion in *Kovacs* v. *Cooper*, 336 U. S. 77, 86-87 (1949), the Court in the *Struthers* case "never intimated that the visitor could insert a foot in the door and insist upon a hearing". Capital Transit and Transit Radio have done more than insert a foot in the door; with the aid of the Government, they have effectively pinned the rider down and forced him to listen.

Even stronger than the *Struthers* case is the decision in *Breard* v. *Alexandria*, 341 U. S. 622 (1951). There the Court held constitutional an ordinance prohibiting door-to-

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[24] Quoted in part in the unanimous opinion of the Court in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 651 (1950).

door canvassing by salesmen soliciting subscriptions to magazines. While stating that the magazines themselves were entitled to the protection of the First Amendment, the Court said that "Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved." 341 U. S. 642.

The *Struthers* and *Breard* cases involved an invasion of the privacy of the home and the idea that "a man's home is his castle", see concurring opinion of Mr. Justice Murphy in the *Struthers* case, 319 U. S. 141, 150. That the right to be protected against the intrusion of unwanted sounds is not limited to the home, however, is shown by *Kovacs* v. *Cooper*, 336 U. S. 77 (1949).[25] Each of the four opinions in that case spoke approvingly of the privacy of the individual or the "quiet enjoyment of home or park" or "the intolerable nuisance" which "the 'blare' of this new method of carrying ideas . . . may under certain circumstances constitute." Mr. Justice Reed, speaking for three Justices, said:

> "The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loudspeakers except through the protection of the municipality." (336 U. S. 86-7).

Mr. Justice Jackson, concurring, said:

> "Freedom of speech for Kovacs does not, in my view, include freedom to use sound amplifiers to drown out the natural speech of others." (336 U. S. 97).[26]

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[25] See also *Commonwealth* v. *Geuss*, 168 Pa. Super. 22 (1950), aff'd per curiam 368 Pa. 290 (1951), app. dism. on authority of *Kovacs* v. *Cooper*, 342 U. S. — (1952).

[26] See also *Kovacs* v. *Cooper*, 135 N. J. L. 64, 68-50 A. (2d) 451, 453 (1946): "The freedom to express one's opinions and to invite others to assemble to hear those opinions does not contain the right to compel others to listen."

Petitioners in their brief misconstrue the holding of the court below and its reliance upon *Kovacs* v. *Cooper*. They state that the court below proceeded on the theory that the Constitution requires the Government to take action against disturbing noises privately caused and that it was the court's view that failure of the Government to take such action would be a deprivation of liberty without due process of law. *Kovacs* v. *Cooper*, however, was relied on for what it held: that the public interest in freedom from forced listening is so important as to outweigh even the public interest in making more effective, by amplifying, a communication ordinarily protected by the First Amendment. Respondents' case cannot be put in the terms used by petitioners. Respondents do not rest on any supposed duty of the Government to come in and protect them against forced listening imposed by purely private action.

No one could say that passengers in Capital Transit's vehicles could be compelled, as a condition of riding, to read one of the advertising leaflets which these vehicles carry. As the Supreme Court said in *Schneider* v. *Irvington*, 308 U. S. 147, 160-161 (1939), in pointing out that the constitutional liberty of distributing literature upon the streets may be regulated in the interest of other uses of the street:

> "... a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet."

In effect, that is just what Capital Transit is doing to the objecting riders, who are themselves traveling on the same streets that Capital Transit is using. Capital Transit is not merely soliciting attention, as it does by the familiar "car-card" advertising posters; it compels it. The distinction is as great as between handing out leaflets and forming a cordon; between ringing the doorbell and inserting a foot in the door. The former may be innocuous; the latter is an invasion of right.

3. Absence of right on the part of petitioners.

Petitioners assert that Capital Transit, Transit Radio and consenting riders have rights under the First and Fifth Amendments which must be weighed against the rights of objecting passengers. These claims must be considered in the context in which they are asserted—as against the rights of a captive audience—and in that context they are not valid.

Full discussion of the free speech claims of petitioners will be deferred to a later portion of this brief in order that they may be treated at the same time as the First Amendment rights which we assert on behalf of objecting passengers. (Point III, *infra*). Briefly, it is our position that Capital Transit and Transit Radio can assert no right to free speech under the circumstances of this case because a captive audience is involved. Free speech to a captive audience is a contradiction in terms. The whole purpose of the constitutional guarantee of free speech is to keep all channels of communication open, to maintain what Mr. Justice Holmes termed the market place of ideas (dissenting opinion in *Abrams* v. *United States*, 250 U. S. 616, 630 (1919)). Where a single group has a monopoly of the outlet and at the same time the practical power to compel one to hear; where there is no opportunity to hear contrasting views, and where other media of communications are interfered with by the speech, there can be no First Amendment right in the speaker, and no First Amendment right of willing hearers to have the speech imposed on objectors.

Petitioners assert in passing, and without citation of authority, a claimed Fifth Amendment right to contract for the programs in question and to promulgate them. Such a right, if it could be postulated into the present circumstances, would be entirely subordinate to the superior constitutional right of objecting listeners under the First and Fifth Amendments. And plainly no one has a constitutional right to violate the constitutional rights of others.

We are well aware that the attention of streetcar passengers is subject to distraction from many other sources than these programs. We make no contention that the Government owes its citizens any duty of assuring quiet or freedom from distraction in public places in general, although the *Kovacs* case shows that the Government can assume that responsibility to some extent. What we do ask is that the power of the Government not be affirmatively used to compel subjection to distracting sounds. The fact that the deprivation of liberty complained of is a result of government action distinguishes the case from all cases of unavoidable or privately carried out distraction. An act may be entirely within the law when performed by individuals and yet, when carried out by the State, violate constitutional rights. It is no answer to the constitutional claim that the individual seeking protection from state action may have to endure a good deal of the same sort of thing through the action of private parties. *Cf. Truax* v. *Raich*, 239 U. S. 33 (1915); see also *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, 641 (1950); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948).

B. PROPERTY.

Forced listening under the circumstances of this case takes the property of objecting riders without due process of law and without compensation, for the private benefit of others. The property taken is the attention of the rider—his time, and the valuable uses to which his attention might be directed were it not for the intrusion of the broadcasts upon the consciousness.

An arbitrary taking away of time which a person desires to devote to his own use is obviously the taking of one of his most valuable properties.

That these programs do in fact deprive objecting riders of the full use of their time is plain from the record. Riders stated at the hearing that the programs "interfered with their thinking [and] reading"; that "the noise was unbear-

able"; that they were "being deprived of their property without due process" (R. 117). The "Public Opinion Survey" showed like objections (R. 155, 156). It is well known that many people use the hours of travel to and from work for purposes directly related to their most important activities. A student may do his lessons. A government official may study papers. A lawyer may even want to study a brief or formulate an argument. All these activities are interfered with or prevented, not just casually and for a moment, but day after day, week after week, for periods dependent each day only on the length of time the harassed rider is compelled by the monopoly power to be subjected to the deprivation.

"Property" is a word of broad meaning, and it must be construed flexibly in accordance with the purpose of the provision in which it stands. *Lawyers Title Ins. Co.* v. *Lawyers Title Ins. Corp.*, 71 App. D. C. 120, 109 F. (2d) 35 (1939); *Schlaefer* v. *Schlaefer*, 71 App. D. C. 350, 112 F. (2d) 177 (1940). Certainly the term "property", in the context of the Fifth Amendment, covers the rights asserted here within its conventional range of reference.

This Court has specifically held that there can be a taking of property by noise in the sense of the Fifth Amendment. *United States* v. *Causby*, 328 U. S. 256 (1946). The same right to protection from noise has been upheld in cases brought by one user of property against another.[27] Basically, what is protected in these cases is the right of human beings themselves to be free from noise. The property is damaged because of what the noise does to humans. The law of privacy, once based on property right, overcame that limitation and now protects the affected personal interests directly. The Constitution is not less flexible than the law of privacy. It is capable of directly protecting those

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[27] See *Stodder* v. *Rosen Talking Machine Co.*, 241 Mass. 245, 135 N.E. 251, 247 Mass. 60, 141 N.E. 569 (1922); *Fos* v. *Thomassie*, 26 So. (2d) 402 (La. App. 1946); *Five Oaks Corp.* v. *Gathmann*, 190 Md. 348, 58 A. (2d) 656 (1948).

aspects of the human personality which do in fact have financial value.

"Property is everything which has an exchangeable value." *Butchers' Benevolent Assn.* v. *Crescent City Live-stock Landing*, 16 Wall. (U. S.) 36, 127 (1872). Only by a disregard of realties can it be argued that the attention of the transit rider is something of no value. This case would never have arisen had not the commercial interests behind transit radio felt that the attention of a captive audience was a valuable thing. The whole purpose of the contract between Capital Transit and Washington Transit Radio, Inc., and of the elaborate installation of receiving equipment in Capital Transit's vehicles, was to capture and sell the attention of the transit-riding public. Indeed, WWDC-FM, the broadcasting station involved in the scheme, has advertised that it is capable by its use of transit radio of "delivering a guaranteed audience."[28] The advertiser is not interested in buying the right to send sound waves from one point to another; he is buying the attention of the captive audience,—at a dollar a thousand (R. 143). To argue that the very subject matter of the contractual arrangements here involved is an ephemeral thing without any real existence is sophistry.

There is an obvious difference between transit radio and other forms of advertising, such as car-cards, magazine advertising, sky-writing, ordinary radio advertising, handbills, etc. The attention of the public may be just as valuable to the advertiser in the case of the other media; but fortunately, he cannot take it by force. Transit radio is different from every other medium—except perhaps the sound-truck, cf. *Kovacs* v. *Cooper*—because of the element of coercion involved. One is not required to listen to radio commercials in his home, or to read the car-cards; but the transit rider has no choice of hearing or not hearing transit radio broadcasts.

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[28] 1949 Radio Annual 363.

Point III. The programs violate the rights of objecting riders under the First Amendment by forcing on them speech which they do not wish to hear, by making it difficult or impossible for them to read, and by making it difficult or impossible for them to converse with others. They also violate the principle against previous restraint. There is no First Amendment right of Capital Transit Company or Washington Transit Radio, Inc. to utter the programs or of consenting passengers to receive them.

A. INTRODUCTION.

We deal here with the First Amendment aspect of these programs. We undertake first to show that they violate the First Amendment rights of objecting riders. We then seek to show that the rights asserted by Capital Transit Company and Washington Transit Radio, Inc. under the First Amendment with respect to these programs, on behalf of themselves and the passengers who like them, do not exist.

There is no claim by the petitioners that the programs themselves or the exertion of governmental power which makes hearing them compulsory are in furtherance of any purpose of the Government. The claim is of purely private right.

B. BASIC PROPOSITIONS CONCERNING FREE SPEECH.

The interest of the speaker himself [29] is of great importance and is the interest which has been most frequently asserted in the courts, since it is upon the speaker that restrictions have been most frequently imposed. But the interest protected by protecting the speaker is the interest also of the listener and of society as a whole. The real interest protected by the First Amendment is freedom of communication, for the sake not of the speaker alone or

[29] References to a speaker include, of course, the writer and the publisher, and references to the listener include the reader.

even of the speaker and the listener but for the sake of society as a whole.[30] The basic assumption, as stated by Milton, Mill, Holmes and the living defenders of free speech, is that the community itself has a paramount interest in the free exchange of ideas, unhindered by governmental suppression or any governmentally established orthodoxy, and that the best test of truth is acceptance in the free market place of ideas.

Freedom of speech, therefore, in the constitutional sense is freedom of communication, of which freedom to read and to listen is an integral part. And this freedom has been most explicitly affirmed. The President, in his Proclamation of the Existence of a National Emergency, recently listed as the second of the "freedoms and rights which are a part of our way of life", enjoyed by the people of this country, "the freedom of reading and listening to what they choose."[31]

Freedom to listen and to read means freedom of choice in listening and reading and necessarily carries with it the freedom not to listen and not to read.[32] To compel a man to read or listen against his will is an abridgement of his freedom in this respect and if prolonged could amount

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[30] See *Grosjean* v. *American Press Co.*, 297 U. S. 233, 243, 250 (1936); *American Communications Assn.* v. *Douds*, 339 U. S. 382, 395 (1950).

[31] Proclamation 2914, 15 Fed. Reg. 9029 (Dec. 19, 1950).

See also Ambassador Warren G. Austin's extended exposition of the United States philosophy of free speech before the First Committee of the United Nations General Assembly, in which he said: "Freedom of speech involves much more than the right to express oneself by word or in print. It is also the freedom to listen, to read, and, above all, to think for oneself . . ." 17 Dept. of State Bulletin 869 (Nov. 2, 1947).

[32] The right not to listen is peculiarly applicable to radio. "What is there then, if there is no free speech in radio? Free hearing. This means two things. First, that the individual is sovereign in deciding what he will listen to. With a flip of the hand he can turn off presidents, dictators, and kings. In the second place, it implies that what the individual wants to hear is on the air." Thomas Porter Robinson, Radio Networks and the Federal Government 85 (Columbia University Press, 1943).

to a total deprivation. Hence a speaker has no right to force his words upon an unwilling listener and the power of the Government may not be exercised, in the absence of a sufficiently important governmental purpose, to compel listening.

An explicit statement of the primacy of the right of the reader and listener is contained in William Ernest Hocking's Freedom of the Press (A Report from the Commission on Freedom of the Press)[33] (1947), in which he says:

> "It is true that in all freedom of speech the listener is assumed to exist. The right to speak, as a privilege to utter words in solitude, has never been disputed, nor claimed; there are always at least two parties in the picture, though only one of them is the claimant of the right. What that claimant is interested in is the opportunity to get his ideas *across*, and into another mind, it being taken for granted that he has found or can find somebody to hear him. The speaker has no right to compel a hearing; there could be no right of free speech if there were not a corresponding right not to listen. It would hardly do to make free speech free and listening compulsory, though that might be the speaker's dream! . . ." (pp. 161-2).

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[33] Members of the Commission on Freedom of the Press were: Robert M. Hutchins, Chairman, Chancellor, University of Chicago; Zechariah Chafee, Jr., Vice-Chairman, Professor of Law, Harvard University; John M. Clark, Professor of Economics, Columbia University; John Dickinson, Professor of Law, University of Pennsylvania, and General Counsel, Pennsylvania Railroad; William E. Hocking, Professor of Philosophy, Emeritus, Harvard University; Harold D. Lasswell, Professor of Law, Yale University; Archibald MacLeish, formerly Assistant Secretary of State; Charles E. Merriam, Professor of Political Science, Emeritus, University of Chicago; Reinhold Niebuhr, Professor of Ethics and Philosophy of Religion, Union Theological Seminary; Robert Redfield, Professor of Anthropology, University of Chicago; Beardsley Ruml, Chairman, Federal Reserve Bank of New York; Arthur M. Schlesinger, Professor of History, Harvard University; George N. Shuster, President, Hunter College.

And the whole Commission states:

> "Though the issuer's interest cannot be realized without an audience, his interest carries with it no claim whatever to compel the existence of an audience but only to invite an audience from men free not to listen. Freedom of the press must imply freedom of the consumer *not to consume* any particular press product; otherwise, the issuer's freedom could be at the expense of the consumer's freedom." (p. 212).
>
> "Hence it is that although there are these two direct interests, *only one of them, in simple conditions, needs protection.* To protect the freedom of the issuer is to protect the interest of the consumer and in general that of the community also. Hitherto in our history it has been sufficient to protect the 'freedom of the press' as the freedom of issuers.
>
> "But, as this analysis is intended to indicate, under changed conditions the consumer's freedom might also require protection . . . " (p. 213) (italics in original)

That the interest of the listener is paramount in the concept of free speech under the First Amendment is clearly recognized in Judge Learned Hand's opinion for a three-judge district court in *National Broadcasting Co.* v. *United States*, 47 F. Supp. 940 (S.D.N.Y. 1942), aff'd 319 U.S. 190 (1943). It was argued there that restrictions on the relationship between broadcasting networks and affiliates were an unconstitutional abridgement of the networks' and affiliates' right of free speech. Judge Hand said:

> "The [Federal Communications] Commission does therefore coerce their choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against the constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i.e., the interests, first, of the 'listeners'; next of any licensees

who may prefer to be freer of the 'networks' than they are, and last, of any future competing 'networks' . . ." (47 F. Supp. 946)

C. THE PROGRAMS VIOLATE THE FIRST AMENDMENT RIGHTS OF OBJECTING RIDERS TO READ, TO CONVERSE AND TO THINK.

The "Public Opinion Study" (R. 155-156) and the opinion of the Public Utilities Commission (R. 117) show that these programs interfere with reading, conversation and thinking. Riders objecting to the programs specifically stated among their grounds of objection that they "want to think, read, study . . . talk" (R. 155, 156). For objecting riders, the programs amount to a "jamming" of the communications which they wish to make to each other or wish to receive from books, magazines, or newspapers, as effectively as if they were designed for that purpose.

D. THE PROGRAMS VIOLATE THE FIRST AMENDMENT RIGHTS OF OBJECTING RIDERS BY VIOLATING THEIR FREEDOM NOT TO LISTEN.

Some objecting riders, as shown by the "Public Opinion Study", specifically stated that they "resent being forced to listen" (R. 156), and objectors stated at the hearing that "the practice deprived them of their right to listen or not to listen" (R. 117). Forced listening violates the First Amendment by substituting compulsion for freedom at the listener's end of the process of communication.

E. BY PUTTING THE FORCE OF GOVERNMENT BEHIND IDEAS CHOSEN BY PRIVATE PERSONS FOR THEIR OWN INTEREST, IN A SITUATION WHERE LISTENING IS COMPULSORY AND NO REPLY IS POSSIBLE, THE PROGRAMS VIOLATE THE BASIC PRINCIPLE UNDERLYING THE FIRST AMENDMENT RULE AGAINST PREVIOUS RESTRAINTS.

The riders in Capital Transit's vehicles are an audience assembled by the governmental force which has given to Capital Transit Company its monopoly of transportation,

and these programs are being addressed to that audience with the approval of the governmental agency charged with supervising the exercise of that monopoly. Broadcasting Station WWDC-FM, Washington Transit Radio, Inc. and Capital Transit Company share between them the power to address whatever communications they like to the audience thus assembled. Capital Transit Company has especially provided for itself two particular advantages. By its basic contract with Washington Transit Radio, Inc. it receives without charge half of the unsold commercial time for use by it for institutional and promotional announcements, subject only to approval by the broadcast station, and it has an absolute veto on any commercial continuity or any sponsor that it finds "objectionable" (Articles IV(c), (d), R. 149). "Commercial continuity" includes announcements designed to further a philosophy as well as commercials designed to sell a product. The increasing use of paid advertisements to "sell" ideas rather than products is well known.[34]

This situation has the essential vice of previous restraint within the meaning of the First Amendment.

A previous restraint is, typically, a government arrangement which gives an officer of Government uncontrolled discretion to prohibit utterances. The vice of this is that the Government thereby destroys free competition in the market place of ideas. The Government itself, in the person of the officer having such uncontrolled discretion, enters the market place of ideas, excluding from it by governmental force the ideas of which it disapproves, placing behind the ideas it favors the weight of governmental approval, establishing thus an orthodox view and excluding competition with it. The view approved by the Government attains acceptance by being unchallenged, and society is molded in its thinking and its action in the image which the Government thus presents to it. This is the essence of

[34] Broadcasting and Telecasting, February 18, 1952, p. 34; 1951 Annual Report of Merrill Lynch, Pierce, Fenner & Beane.

dictatorship in its application to the realm of ideas, and it is not the less dictatorship where there is no governmental compulsion to listen to what is said or read what is printed.

There is probably no rule under the First Amendment which is more deeply grounded in the necessities of our society than the rule prohibiting such previous restraints. Cf. *Near* v. *Minnesota*, 283 U. S. 697 (1931).

The programs in this case have the essential vice of previous restraints because they are an orthodoxy established with the aid of governmental power. The three primary parties to the emission of the programs—Capital Transit, Transit Radio and WWDC-FM—have uncontrolled discretion as to what shall be said. They exclude what they like and they say what they like. The only difference is that the governmental power is exercised not at the point of utterance but upon the listener. What is not said he does not hear. What is said he must hear. From his standpoint the effect is, if anything, worse. In the traditional case of previous restraint the citizen does not have to read the book which the censor passes. The rider in the bus has to listen.

It is true that the compulsion is exercised upon the rider only while he is on the bus. When he leaves it he is a free man again, able to choose his own radio program and to read what he likes and to discover truths not presented to him by the radio station, Transit Radio, Capital Transit and the advertisers who have bought the opportunity of talking to him. But under the decisions of this Court that is a difference of no legal consequence. The rule against previous restraint does not apply merely to regulations applicable to the whole country. It applies to all officers whatsoever, no matter how small their jurisdiction. It applies to the official of Jersey City who refuses to permit the use of the streets or parks for a purpose of which he disapproves, *Hague* v. *C. I. O.*, 307 U. S. 496 (1939), and to the official of Lockport who refuses to permit the use of a loudspeaker, *Saia* v. *New York*, 334 U. S. 558 (1948). There

were other possible meeting places in Jersey City. There were other means of communication in Lockport. The previous restraint was unconstitutional nonetheless.

If differences of degree are to count at all in such matters the situation here is worse. The speakers excluded there were excluded on relatively brief occasions that happened only sporadically. The audience denied the opportunity of listening to what would have been said was an audience of necessarily shifting membership, encountering the speech casually and briefly, not certain to be exposed to it again, and limited in number to the capacity of the park or the range of the loudspeaker. Here the audience consists of hundreds of thousands of persons each working day exposed to the broadcasts (those at least who use Capital Transit's vehicles to go to or from work or on other regular weekday tasks) two hundred or more times a year.

In another respect also the situation here is worse. A public official, however unlimited his discretion, is subject to being called to account for his actions. A party aggrieved may voice his grievance through legal action, as was done in the *Hague* and *Saia* cases, or through the newspapers. Furthermore, though the official's discretion may be unlimited under the terms of the law, he will doubtless formulate some rule for himself in accordance with what he conceives to be public policy, and the rule may be ascertainable. In any event he may not be always guided by his personal interests, narrowly or broadly conceived. Here the decision is made by private parties, in ways that cannot be found out, in accordance with undisclosed standards, and really for the purpose of private profit.

We come now to a consideration of the ideas and views which the persons controlling these programs have actually put forth. The station log and the complete textual material, other than time signals, weather reports, station identification, sports and news broadcasts, of October 13, 1949 (a typical day) are in the record (R. 142-143, 156-172).

Certain of these announcements were obviously controversial in character.

This is unmistakably true of the two separate texts, each broadcast ten times, in defense of transit radio itself (R. 156-159, 163, 164):

> "This program is being heard by home listeners, and in radio equipped buses and street cars, without cost to the Capital Transit Company or you. Actually advertising revenues from these programs help to pay the cost of your transit ride. This is important to you in the face of higher transit operating costs."

> "These programs are being heard by our F. M. listeners at home, as well as those of you riding on Capital Transit radio-equipped street cars and buses. The receivers and speakers aboard these vehicles have been installed by Station WWDC-FM, which broadcasts these programs without cost to the Capital Transit Company."

The first of these announcements is fairly to be construed as meaning that "advertising revenues from these programs" was at that time an "important" help toward paying the cost of the ride. At that time however the revenue from the programs amounted to only six dollars per month for each of the 212 vehicles then equipped, or $15,264 a year (R. 37, 150). This was less than one-fourteenth of one percent of the Company's gross operating revenue ($27,000,000) for the previous year (Annual Report of Capital Transit Company for 1948), and amounted to approximately $0.0001 (one one-hundredth of a cent) per cash fare.

The second announcement appears to be factually incorrect. The basic contract between Capital Transit and Transit Radio provides for the installation of the receivers and speakers by Transit Radio (R. 146). Station WWDC-FM is owned and operated by Capital Broadcasting Company, which is a different corporation from Washington Transit Radio, Inc.

The date on which these announcements were made, October 13, 1949, was exactly two weeks before the date

already fixed for the opening of the Public Utility Commission's hearing in this matter; that date had been fixed by the Commission's notice of hearing dated September 19, 1949 (R. 29). It is a matter of common knowledge that at the time of these two announcements there had already been widespread discussion of these programs, and the Commission's order of July 14, 1949 directing that the hearing be held stated that the Commission had received "a number of communications protesting the use of radios on the vehicles of the Company" (R. 28). It seems apparent that these announcements were made for the purpose of influencing public opinion concerning the subject matter of the hearing. It is constitutionally improper to give private persons the power to address such messages in their own interest to a captive audience.

The announcements made concerning the American Cancer Society, CARE, the United States Employment Service and safety in street-crossing and the announcements giving Capital Transit's telephone number for information on how to reach FBI tours, the Zoo and the Library of Congress (R. 161-162, 168-171) are in themselves, apart from the circumstances in which they were issued, innocuous. But they represent on the part of Capital Transit, Transit Radio and WWDC-FM a decision to speak on these subjects rather than others—to further these charities or purposes rather than others; and they effectuate that decision, in the minds of the hearers, all the more effectively because of their innocuousness on the surface. The relative merits of these charities and interests as against others is a matter as to which individuals must necessarily differ. It is constitutionally improper for the power of the Government to be used by private persons to further those chosen rather than others.

The commercials occupied far the greater part of the time filled by the textual announcements (other than the news broadcasts). Apart from any controversial material in the text of a particular commercial it is constitutionally improper for the power of the Government to be placed

behind these particular products and services rather than others.

Furthermore, advertising as a whole represents a point of view—a point of view of many facets. It is in the main the point of view of those who have commodities or services to sell; it states their views from their own standpoint, with usually only such recognition of the consumer's interest as they think profitable from their own standpoint; it inevitably implies the view that life is made fuller and happier by the purchase of things rather than, say, by the pursuit of values not so extensively dependent upon commodities. It does so not only by reasoned argument but by appeals to the emotions. Its practitioners have been called the most highly paid poets of our culture.[35] This is not to question the exceedingly important function which advertising performs in our economy. But we do say that it is constitutionally improper for the power of Government to be placed behind advertising and its points of view, when advertising is addressed, as here, to objecting members of a captive audience.[36]

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[35] Broadcast by S. I. Hayakawa entitled "Poetry and Advertising," reported in Advertising Age, December 3, 1951, p. 22.

[36] A similar view has been expressed by a leading member of the advertising profession. Addressing the International Advertising Conference in London, England, July 9, 1951, Mr. Fairfax M. Cone, president of the advertising firm of Foote, Cone & Belding, president of The Advertising Council, Inc., and past president of the American Association of Advertising Agencies, said in part:

> "Outdoor advertising, of course, is but one of our problems. And they are not all in the field of method. However let me point to one other minor one and to another major method that are our responsibility together. The first may as yet not have crept into any other corner of the world than my own. And if it hasn't I warn you to beware of it; and if it shows up—stamp it out. It is advertising to *captive audiences* by means of broadcasting in railroad terminals and public conveyances and the like—to people who have no means to turn this advertising off. An outraged public demanded and got discontinuance in one of New York's great terminals. But the bus company in at least one large city has gone to court to

The same is true of the news broadcasts. The selection of news for a two-minute broadcast necessarily represents a point of view as to the items to be selected. These are heard by the audience. The others are not. The same constitutional impropriety is present.

It is improper for the power of the Government to be invoked for compulsory indoctrination of any kind, except where some clearly valid governmental purpose is subserved.[37] The Government can compel children to attend school—though not necessarily a public school, *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925)—it can compel a citizen to listen to air raid directions, but it cannot lend its authority to an infringement of liberty whose chief if not

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establish its right to broadcast as it chooses. And I can only hope that it will be unsuccessful.

"My hope, incidentally, is not based entirely on pity for the captive audience. I have that, to be sure. But much more important is the fact that just as advertising is an instrument of a free choice society, it should of itself offer freedom of choice: To see it or hear it. Or *not*. And to be moved by it. Or not. As anyone may desire. This is the way with advertising in newspapers and magazines, and on boardings and in handbills." (Emphasis in original).

The address was reported in part in the New York Times, July 10, 1951, p. 37, col. 2.

[37] The sponsorship by the Government of a particular point of view even to a non-captive audience, is not regarded with favor. See the Federal Register Act, July 26, 1935, ch. 417, § 5, 49 Stat. 501, 44 U. S. C. § 305, which after providing in subsection (a) for the publication in the Federal Register of various classes of documents, states in subsection (b) that "In addition to the foregoing there shall also be published in the Federal Register such other documents or classes of documents as may be authorized to be published pursuant hereto by regulations prescribed hereunder with the approval of the President, but in no case shall comments or news items of any character whatsoever be authorized to be published in the Federal Register." See also Act of October 12, 1913, ch. 32, § 1, 38 Stat. 212, 5 U. S. C. § 54 ("No money appropriated by any act shall be used for the compensation of any publicity expert unless specifically appropriated for that purpose").

only purpose is private profit. No governmental purpose is served by the programs involved in this case.

The forced listening present here is, in a limited area and on a small scale, the very practice of forced listening which, on a far wider scale, is a basic instrument of totalitarian government.[38] This is plainly what was meant by the objection made at the Commission's hearing that these programs "would lead to thought control" (R. 117).[39]

Toleration of this practice of broadcasting to a captive audience leads to one or another of two alternatives, each equally repugnant to the basic philosophy of the First Amendment. The first alternative is regulation of the content of the programs by some agency of the Government. This would be completely contrary to our traditions, would raise grave constitutional questions, and would violate the declared policy of Congress that there shall be no censorship of radio programs. (Communications Act of 1934, Section 316, 47 U. S. C. §316).

The other alternative is to leave the control in the hands of the persons who are now exercising it—the persons who are conducting these programs in their own personal interest. A deliberate governmental decision to leave the control of such vital matters in those hands would raise

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[38] Grandin, The Political Use of Radio, Geneva Studies, vol. 10, no. 3 (1939); Inkeles, Domestic Broadcasting in the U. S. S. R. (1949), pp. 281-2; Hill and Williams, Radio's Listening Groups (1941), p. 154.

[39] This danger is emphasized by other announcements known to us, which have been broadcast since the Commission's hearing and are therefore not in the record: General MacArthur's speech to Congress on April 19, 1951, broadcast as it was being delivered; the statement that WWDC-FM mourns for La Prensa,—a statement which, as made by many radio stations, was protested by the Argentine Ambassador; an anti-vivisection announcement, which was protested by the Secretary of the Medical Society of the District of Columbia; the calling upon the captive audience to join in silent prayer for our forces in Korea; an announcement of the National Foundation for Consumer Credit; and a statement critical of the decision of the court below, made a few hours after that decision was handed down, by Mr. Strouse, president of Washington Transit Radio, Inc. and general manager of WWDC-FM.

serious constitutional questions apart from the First Amendment. Compare *Tumey* v. *Ohio*, 273 U. S. 510 (1927). And it is a course repugnant to the First Amendment, for the reasons already indicated. Moreover it is too much to hope that any self-imposed limitations, however sincerely adopted and announced in the first instance, will withstand the pressures toward expansion which result from financial opportunities.

What Capital Transit and Transit Radio have, because of their exploitation of the captive audience, is a monopoly in mass communication—a temporary and localized monopoly, to be sure, but by no means an insignificant one, considering the number of persons who ride Capital Transit's vehicles each day. Monopoly in mass communication is disfavored in the law. *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); see also *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1939). Certainly, constitutional rights of unwilling listeners should not be overriden in order to foster such a monopoly.

F. THERE IS NO FIRST AMENDMENT RIGHT OF CAPITAL TRANSIT COMPANY, WASHINGTON TRANSIT RADIO, INC. OR THE CONSENTING LISTENERS TO HAVE THESE BROADCASTS CONTINUE

Petitioners assert that a right to listen to these broadcasts exists in favor of consenting riders. That contention expresses a complete misunderstanding of the right to listen. That right is a right in aid of the market-place of ideas—a right to be free from previous restraint and the governmental suppression of ideas which is incidental to previous restraint. To apply that right to these programs would be to subvert the very purpose of the right. An act of Congress explicitly sanctioning these programs would in our view be clearly unconstitutional. As the court below said, "the will of a majority cannot abrogate the constitutional rights of a minority". (R. 130)

For the same reasons, Capital Transit and Transit Radio have no First Amendment right to make these broadcasts.[40]

Point IV. The Public Utilities Commission acted illegally in dismissing its investigation and thereby approving the practice complained of, and the Court of Appeals had authority to set aside such erroneous action.

The Commission's "dismissal" of its investigation is tantamount to a specific approval of the practice. If the Commission had ruled against the programs, they would have ceased; it has not ruled against them, and they have continued. The negative form of the Commission's order is not controlling. *Mitchell* v. *United States*, 313 U. S. 80, 93 (1941); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125 (1939).

The Commission's order states that

> "The investigation conducted and the evidence presented . . . must, of necessity, be considered by this Commission strictly in the light of its jurisdictional powers",

and that its powers are limited to the determination of whether or not the installation and use of radio receivers in street cars and buses "is consistent with public convenience, comfort and safety." (R. 116). It acknowledges that it has power to direct such changes in equipment "as are necessary to promote the comfort or convenience of the public." (R. 116).

The Commission's reference to its "jurisdictional powers" apparently was intended as a declaration by it that the arguments of constitutional right advanced by respondents could not be considered by the Commission under the heading of "public convenience, comfort and safety."

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[40] In the light of the foregoing analysis it is unnecessary to develop the argument that a special infirmity attaches to the commercials under the rule of *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942).

This amounts to a contention by the Commission that the broadcasts can be "consistent with public convenience, comfort and safety" even though they interfere with the right of the riders, under the First Amendment, not to listen; even though they deprive the riders of liberty under the Fifth Amendment; even though they take the private property of riders for private use and without compensation in violation of the Fifth Amendment; and even though they violate the right of privacy and the ordinary duty of a common carrier to its passengers. We contend that such a view of the Commission's powers is repugnant to common sense and a clear misconstruction of the Commission's statutory authority.

The Act governing the Commission and appeals from its decisions makes it perfectly clear that constitutional questions are not, as such, beyond the Commission's powers. Paragraph 64 of the Act (D. C. Code (1940) § 43-704) says that "no . . . person . . . shall in any court urge or rely on any ground" not set forth in an application to the Commission for reconsideration. Paragraph 66 (§ 43-706) says that on any appeal from the Commission "the review by the court shall be limited to questions of law, including constitutional questions." The constitutional questions, therefore, must have been raised before the Commission to be available in court on appeal. Hence, they are not, simply as constitutional questions, beyond the Commission's jurisdiction. The Commission is empowered to compel every public utility to comply with law (Paragraph 4, D. C. Code (1940) § 43-303) and it can hardly be contended that the Commission lacked "jurisdiction" to stop the forced listening, under the standard of public convenience, comfort and safety, if it offended constitutional rights.[41]

[41] The Commission, at approximately the same time, did in fact consider and pass upon a consumer's constitutional claim in *In the Matter of Katz*, 80 P. U. R. (N.S.) 76 (D.C. P.U.C., 1949).

The Commission cannot conclusively determine the constitutional rights of citizens. Its determinations are always open to review on matters of law, and it made no findings of fact (R. 114-120). Requiring the Commission to proceed in accordance with the law and to recognize constitutional rights is no intrusion on its legislative functions. This case was not an occasion for the exercise of expertise or discretion by the Commission. The Government is collecting customers for Capital Transit for one purpose—the purpose of transportation. Capital Transit has no right to exploit them for another purpose, and it was the duty of the Commission to stop it from doing so.

Vacation of the Commission's order and remand to the Commission for further proceedings was clearly within the power of the District Court and hence of the Court of Appeals. *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 373-4 (1939); *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 159-160 (1939). To say that respondents cannot secure relief in this proceeding but "must institute another and distinct proceeding, would be to put aside substance for needless ceremony." *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 591 (1926).

Point V. The decision of the Court of Appeals was based on facts and considerations properly before it.

The petitioners contend (Pet. Br. 41-45) that the Court of Appeals, relying heavily on the "emotional overtones inherent in this case", went outside the record in four instances to sustain its opinion. Petitioners do not argue that any of the alleged departures from the record was on a matter essential to the conclusions stated by the court. They merely claim generic error and contend that " . . . it cannot be presumed that its error in this regard is without significance."

Rhetorical or immaterial excursions outside the record in a case arising from the activities of an administrative

agency would scarcely be considered grounds for reversal of a decision of the highest court of the District of Columbia. Even so, the departures set up by the petitioners are extremely strained:

(1) *The Washington Post poll* (Pet. Br. 42-43). From the very beginning of these proceedings and at every opportunity, the petitioners have adverted to Capital Transit's so-called Public Opinion Studies (e.g., R. 155-156). They find themselves tempted almost to argue that their polls are conclusive on the courts (Pet. Br. 28, 30-31, 43). The Court of Appeals placed no reliance on the poll because it did not even touch the questions with which the court was concerned. The court mentioned the absence of any evidence "that any large group of passengers actually wish to go on being entertained by broadcasts forced upon other passengers at the cost of their comfort and freedom." A footnote at that point indicates that the court was aware indeed of the petitioner's poll and did not care for it. The footnote then makes a brief reference to a balloting conducted by the Washington Post which did not claim to be scientific. Neither poll nor ballot made any difference to the Court of Appeals.

(2) *The use of adjectives and modifying expressions.* The petitioners complain that there are phrases appearing in the opinion of the Court of Appeals which the petitioners believe are not justified by the record (Pet. Br. 43). In fact, they argue, the expressions are contrary to the record. The language thus objected to says: (a) that "forced listening" is "well known"; (b) that "the record makes it plain that the loss [of freedom of attention] is a serious injury to many passengers"; and that forced listening was "proved by many witnesses".

(a) Forced listening is indeed well known, so well known and of such general interest that on June 1, 1951, when the Court of Appeals decision was announced, it was the subject of the banner page-one headline in the evening editions

of the Washington Star and the Washington Daily News and was the left-hand, page-one story of the Washington Post the following morning.

(b) An examination of the record by the Court of Appeals quite properly convinced the court that there was serious injury to many. The whole nature of the case, even as summarized by the Public Utilities Commission (R. 117), indicates that the Commission was aware of the serious injury to many.

(c) Unless we misunderstand petitioners' argument objecting to the words "many witnesses", that argument has the appearance of a quibble. The petitioners use the word "witnesses" in a technical sense as describing persons under oath. The court and the Public Utilities Commission (in its capacity as the administrative body, not as a present litigant) used the words "witnesses" and "testified" to include all who made statements received in the record and considered by the Commission (e.g., Transcript of Hearing before the Public Utilities Commission 66, 67). While it may be true that there were but two witnesses (technical) opposing transit radio, there were many witnesses (actual) who further opposed it, including 28 who went to the witness chair and stated unsworn opposition. Three citizens' associations appeared in active opposition (R. 117) as did Transit Riders' Association for its 43 members (R. 117). The "true and correct record and transcript of proceedings" certified by the Commission includes many unsworn documents (R. 174-178).

(3) *Footnote references to affidavits.* Petitioners (Pet. Br. 43) complain of footnotes 3 and 5 of the opinion of the Court of Appeals and argue that references there to respondents' supplementary application for reconsideration and the affidavits attached to it are error. The Court of Appeals referred to these papers to document the obvious facts that passengers hear the programs whether they want to or not and are a "guaranteed" audience. High appel-

late courts do not need "record citations" to enable them to refer to such matters as these.

(4) *The error in footnote 15.* The petitioners are correct (Pet. Br. 44-45) in pointing out that there is an error in footnote 15 of the opinion of the Court of Appeals. The court there quoted the Chairman of the Public Utilities Commission. The erroneous quotation makes the Chairman appear to be asserting what he in fact denied.[42] This was surely an inadvertent and unintended unfairness to the Chairman and doubtless full justice would have been done him had the Public Utilities Commission in its capacity as a litigant made an appropriate motion for correction of the opinion. As much as the error is to be regretted, it makes no difference. The sentence in the opinion of the Court of Appeals to which the footnote is appended reads, "The interest of some in hearing what they like is not a right to make others hear the same thing." That sentence states a proposition of law which both petitioners and respondents are here arguing quite fully. The intruding footnote in correct form, or in erroneous form, neither supports nor contradicts the ruling of the court.

CONCLUSION.

Important issues are involved in this case. Important values are concerned—some of the most important with which the courts can deal. The Court is not faced here

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[42] The error first occurred in the transcript of record before the Public Utilities Commission. The error was apparently picked up by the Court of Appeals. Unfortunately, the court did not consult or note a "correction sheet" which was physically a separate document. Thus the error was a most natural one. In fact, there are two similar errors in that portion of the present record which was printed for the court below. At R. 85, the first word of Folio 385, third sentence, should be corrected from "could" to "did", and the word "in" should have been inserted as the third word in line 4, R. 86. This portion of the record was designated for printing by the petitioners and it was their responsibility to see to it that the correction sheets there applicable were effectuated. Thus they twice made the mistake that the court below made once.

with an attempt of a minority to impose its own judgment upon the public. It is faced with an attempt by a large commercial organization to use the powers of Government to invade the rights of others—individuals lacking corresponding economic strength.

Standardization of thought is something which has always been irreconcilable with American democratic ideals. The power of the state should not be employed to compel people to listen to the advertising and other matter which a particular radio station chooses to broadcast. There is nothing unreasonable about not wanting to be forced to hear this matter. It is a matter of common knowledge that tastes differ widely concerning the content of radio programming. Until now the individual listener has always retained at least a veto power, the power to turn to another station or to turn the radio off entirely. Transit radio makes him part of a captive audience and deprives him of choice.

Forced listening supported by governmental action is an exercise of collective force at its most dangerous incidence—on the mind. It offends the letter as well as the spirit of the guarantees of the First and Fifth Amendments. It should not be tolerated.

Respectfully submitted,

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